Kemajuan Hunda Kredit (Kuching) Sdn Bhd v Titus Chuo Mui Ing

HIGH COURT (KUCHING) — CIVIL APPEAL NO KG11 OF 1994(II)
ABDUL KADIR SULAIMAN J
19 JANUARY 1995

Civil Procedure *— Appeal — Record of appeal — Time for filing record of appeal where appeal from decision of magistrate in summary proceedings — Amendment to rules of court — Whether provision to be followed depends on date of judgment appealed against or date of filing of notice of appeal — Subordinate Courts Rules 1980 O 49 rr 2, 3, 3A & 6*

Civil Procedure *— Appeal — Record of appeal — Whether inclusion of documents specifically excluded under O 49 r 6(3) of Subordinate Courts Rules 1980 amounted to non-compliance — Whether appeal should be dismissed — Subordinate Courts Rules 1980 O 49 r 6(3)*

On 6 February 1990, the appellant ('the plaintiff') obtained summary judgments against, inter alia, the respondent ('the second defendant') under O 26A r 1 of the Subordinate Courts Rules 1980 ('the Rules'). The second defendant successfully applied to set aside the judgment. The plaintiff filed his notice of appeal against the setting aside order on 2 August 1993, ie one day after the coming into force of O 49 r 6 which replaced O 49 rr 2, 3 and 3A. Order 49 r 6 lays down the procedure for appeals from summary proceedings and provides that the record of appeal shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal. On 28 April 1994, about nine months after the filing of the notice of appeal, the plaintiff filed his record of appeal in accordance with O 49 r 3A(3) which provided that the record of appeal was to be filed within six weeks of receipt of notification from the court appealed from that the certified copies of the notes of evidence and the grounds of judgment were ready. The plaintiff's record of appeal included the items specifically excluded in O 49 r 6. The second defendant raised the preliminary objections that the plaintiff: (i) had included in his record of appeal those matters 'prohibited' by O 49 r 6(3) of the Rules; and (ii) had filed the record of appeal out of time. The plaintiff, however, contended that O 49 r 6(3) did not apply in the instant case because the order appealed against was made before the coming into force of O 49 r 6.

Held, dismissing the appeal:

(1) In this case, the non-compliance with the Rules was merely as to the plaintiff supplying more matters than was necessary under O 49 r 6(3). By analogy to O 56 of the Rules of the High Court

1980, the appeal would be by way of a rehearing and, therefore, the additional information supplied to the judge in chambers would not in any way prejudice the second defendant. The first preliminary objection was thus overruled.

(2) With effect from 1 August 1993, this appeal, being an appeal against a decision made in summary proceedings, was no longer governed by O 49 r 3A but by O 49 r 6(3). The rule was already in operation on the date of the filing of the notice of appeal and consequently, the filing of the record of appeal had to comply with r 6(3), ie within three weeks from the filing of the notice of appeal, notwithstanding the fact that the decision appealed against was made before the coming into force of the rule. The three weeks had expired on or about 23 August 1993 and the filing of the record was clearly outside the period prescribed by the Rules. As such, the appeal was dismissed.

[Bahasa Malaysia summary

Pada 6 Februari 1990, perayu ('plaintif') telah memperolehi penghakiman terus terhadap, antara lain, responden ('defendan kedua') di bawah A 26A k 1 Kaedah-Kaedah Mahakamah Rendah 1980 ('Kaedah-Kaedah itu'). Defendan kedua telah berjaya dalam permohonannya untuk mengenepikan penghakiman itu. Plaintif telah memfailkan notis rayuannya terhadap perintah pengenepian itu pada 2 Ogos 1993, iaitu sehari selepas berkuatkuasanya A 49 k 6 yang menggantikan A 49 kk 2, 3 dan 3A. Aturan 49 k 6 memperuntukkan prosedur yang mesti diikut untuk rayuan daripada prosiding terus dan memperuntukkan bahawa rekod rayuan tidak termasuk nota keterangan, alasan penghakiman atau apa-apa memorandum rayuan. Pada 28 April 1994, lebih kurang sembilan bulan selepas notis rayuan difailkan, plaintif telah memfailkan rekod rayuannya mengikut A 49 k 3A(3) yang memperuntukkan bahawa rekod rayuan perlu difailkan dalam tempoh enam minggu dari tarikh penerimaan pemberitahuan dari mahkamah terhadap mana rayuan dibuat bahawa salinan sah nota keterangan dan alasan penghakiman telah disediakan. Rekod rayuan plaintif mengandungi perkara yang secara nyata tidak termasuk di dalam A 49 k 6. Defendan kedua telah menimbulkan bantahan permulaan bahawa plaintif: (i) telah memasukkan di dalam rekod rayuannya perkara-perkara yang 'dihalang' oleh A 49 k 6(3) Kaedah-Kaedah itu; dan (ii) telah memfailkan rekod rayuannya di luar had masa. Plaintif, walau bagaimanapun, telah menegaskan bahawa A 49 k 6(3) tidak terpakai di dalam kes ini kerana perintah terhadap mana rayuan dibuat telahpun dibuat sebelum A 49 k 6 mula berkuatkuasa.

Diputuskan, menolak rayuan itu:

(1) Di dalam kes ini, ketidakpatuhan dengan Kaedah-Kaedah itu semata-matanya berkaitan dengan plaintif memberikan lebih

perkara yang diperlukan di bawah A 49 k 6(3). Dengan membuat perbandingan dengan A 56 Kaedah-Kaedah Mahakamah Tinggi 1980, rayuan itu akan dijalankan secara suatu pendengaran semula dan, dengan itu, maklumat tambahan yang diberikan kepada hakim dalam kamar tidak akan menjejaskan defendan kedua dalam apa carapun. Oleh itu, bantahan permulaan pertama ditolak.

(2) Mulai dari 1 Ogos 1993, rayuan ini, yang merupakan suatu rayuan terhadap suatu keputusan yang dibuat di dalam prosiding terus, tidak lagi tertakluk kepada A 49 k 3A tetapi oleh A 49 k 6(3). Kaedah itu telahpun berkuatkuasa pada tarikh notis rayuan difailkan dan akibatnya, pemfailan rekod rayuan itu mesti mematuhi k 6(3), iaitu dalam tempoh tiga minggu dari pemfailan notis rayuan, tidak kira hakikat bahawa keputusan terhadap mana rayuan itu dibuat telah dibuat sebelum kaedah itu mula berkuatkuasa. Tempoh tiga minggu itu telah luput pada 23 Ogos 1993 dan pemfailan rekod itu adalah jelas di luar tempoh yang ditetapkan oleh Kaedah-Kaedah. Dengan demikian, rayuan ini ditolak.]

Notes

For cases on the record of appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 624–636.

Case referred to

Ng Yit Seng & Anor v Syarikat Jiwa Mentakab Sdn Bhd & Ors [1981] 2 MLJ 194 (distd)

Legislation referred to

Federal Court (Civil Appeals) (Transitional) Rules 1963 r 19(8)
Rules of High Court 1980 O 56
Subordinate Courts Rules 1980 O 26A rr 1, 11, O 49 rr 2, 3, 3A, 6

TO Tan (*Tan, Yap & Tang*) for the appellant.
KC Wong (*KC Wong & Associates*) for the respondent.

Cur Adv Vult

Abdul Kadir Sulaiman J: Prior to 1 August 1993 there was a common procedure for appeals from the decisions of subordinate courts to the High Court as provided by O 49 of the Subordinate Courts Rules 1980 (hereinafter referred to as 'the Rules') irrespective of whether a decision arose out of a full trial or out of summary proceedings. Rule 1 defines 'decision' to include 'judgment', 'order' and 'decree'. The procedure for filing and service of the notice of appeal and appeal record are to be found

in rr 2, 3 and 3A of the Rules. However, by PU(A) 193/93 the Rules provide a new r 6 to O 49 to take effect from 1 August 1993. The effect of the amendment is that as from that date, the procedure for appeals in respect of a decision arising out of summary proceedings in a subordinate court, is taken out of rr 2, 3 and 3A of O 49 of the Rules, and replaced by this new r 6. As regards the time for the service of the record of appeal, r 6 is silent and in the circumstances, by necessary implication, based on the provision of r 3A(4), it must be done within the period limited for the filing of such record, which according to r 6(3) is within three weeks of the filing of the notice of appeal. This appeal being in relation to a decision made in a summary proceedings lies to a judge in chambers.

The new O 49 r 6 states:

> (1) Notwithstanding anything contained in this Order, an appeal shall lie to a Judge in Chambers from any decision made by the Court other than a decision made after trial.
>
> (2) The appeal shall be brought by filing a notice of appeal in Form 140 within 14 days from the day on which the decision was pronounced, and serving a copy of the notice on every other party to the proceedings within the time limited for the filing of appeal to the Registrar of the High Court.
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> (3) Within three weeks after the filing of the notice of appeal, the appellant shall file the record of appeal in the High Court and the record shall contain copies of —
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> (a) the application for the decision;
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> (b) the statement of claim, and where defence has been filed, the statement of defence;
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> (c) all affidavits filed in support of or in opposition to the application; and
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> (d) the decision appealed from,
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> but shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.

This new O 49 r 6 is akin to O 56 of the Rules of High Court 1980 (hereinafter referred to as 'the RHC') where an appeal would lie to a judge in chambers from any judgment, order or decision of the registrar. The hearing before the judge in chambers pursuant to O 56 of the RHC is by way of a rehearing and for that reason the new O 49 r 6(3) of the Rules is tailored in such a way that the notes of evidence, the grounds of judgment and memorandum of appeal are not required to be included in the record of appeal.

On 6 February 1990, the appellant, who was the plaintiff in the court below and for convenience will be referred to as such in this judgment, obtained summary judgments against two defendants including the second defendant, the respondent in this appeal, pursuant to his application made under O 26A r 1 of the Rules. On 20 July 1993, on the application of the second defendant, the learned magistrate set aside that order for summary

judgment entered against him. The plaintiff, not happy with the decision filed his notice of appeal on 2 August 1993 which is one day after the coming into force of r 6 to O 49 of the Rules. On 28 April 1994, after a lapse of about nine months after the filing of the notice of appeal, the plaintiff filed his record of appeal.

When this appeal of the plaintiff came up for hearing, the learned counsel for the second defendant raised a preliminary objection concerning the time the plaintiff took to file the record of appeal after the filing of his notice of appeal and as to its content, in the light of the said amendment to the Rules.

The plaintiff's record of appeal contains the following:

(a) the summons;

(b) the joint defence of both the defendants including the second defendant;

(c) notice of application under O 26A r 1 made by the plaintiff for summary judgment;

(d) the court order of 6 January 1990 for summary judgment;

(e) notice of application under O 26A r 11 made by the second defendant to set aside the order for summary judgment;

(f) the court order of 20 July 1993 setting aside the summary judgment;

(g) the statement of defence of the second defendant made pursuant to the court order setting aside the summary judgment;

(h) the notes of evidence before the learned magistrate;

(i) the magistrate's grounds for setting aside the summary judgment;

(j) the notice of appeal; and

(k) the memorandum of appeal.

By his preliminary objection, the learned counsel for the second defendant urged the court to dismiss the appeal of the plaintiff on the ground, firstly, that the plaintiff had included in his record of appeal those matters 'prohibited' by r 6(3) of O 49 of the Rules, ie items (h), (i) and (k) mentioned above. The learned counsel submitted that since O 49 r 6(3) of the Rules does not allow the inclusion of the notes of evidence, the grounds of judgment or any memorandum of appeal, the plaintiff by doing so in this case had not complied with the statutory provision. He cited the case of *Ng Yit Seng & Anor v Syarikat Jiwa Mentakab Sdn Bhd & Ors* [1981] 2 MLJ 194 wherein the Federal Court held that the appeal must be dismissed because the appellant had failed to comply with the statutory provisions. In that case, the subject matter of non-compliance with the statutory provision was the failure to serve the copy of the record of appeal on the respondents or their solicitors as required by r 19(8) of the Federal Court (Civil Appeals) (Transitional) Rules 1963. In my view, the decision

in that case can be easily distinguished on the facts. At p 195, Abdoolcader J (as he then was) said:

> We have in our judgment in *Pow Hing & Anor v Registrar of Titles, Malacca* [1981] 1 MLJ 155 (at p 157) set out an exposition of the mandatory-directory dichotomy in relation to statutory requirements and it is only necessary to add in the context of the matter before us that even in relation to directory provisions substantial compliance is still necessary and that the failure to observe directory requirements may also lead to invalidity.

In this case, the non-compliance is merely as to the plaintiff supplying more matters than is necessary for compliance with O 49 r 6(3) of the Rules. By analogy to the requirement of O 56 of the RHC of the rehearing of the appeal, the additional information to the judge in chambers will not in any way prejudice the second defendant. I will accordingly overrule this preliminary objection on that ground.

Then comes the second objection by the learned counsel for the second defendant that the filing of the record of appeal by the plaintiff is out of time. Order 49 r 6(3) requires that the record of appeal must be filed within three weeks after the filing of the notice of appeal. In this case, the notice of appeal was filed on 2 August 1993 whilst the record of appeal was filed only on 28 April 1994, which is clearly outside the time frame of three weeks allowed by the rule. The learned counsel for the plaintiff in reply submitted that O 49 r 6(3) does not apply in the instant case because the order appealed against was made before the coming into force of r 6. The procedure to follow is O 49 r 3A(3) notwithstanding the amendment. Under O 49 r 3A(3), the appeal record is required to be filed within six weeks of the receipt of the notification from the court appealed from that the certified copies of the notes of evidence and the grounds of judgment are ready. In this case, the learned counsel says, the notification from the court appealed from of the availability of the certified copies of the notes of evidence and the grounds of judgment was received only on 18 April 1994 and he had six weeks from that date to file the record under O 49 r 3A(3) of the Rules. Hence the filing of the record on 28 April 1994 was well within time. I think the submission lacks merit because the nature of the appeal in this case with effect from 1 August 1993, as stated earlier, was no longer governed by O 49 r 3A but by O 49 r 6(3) because the appeal was against the decision 'other than a decision made after trial' which in this case was a decision made in summary proceedings. Under r 6(3), the notes of evidence and the grounds of decision no longer form part of the record of appeal. Without having to consider whether the operation of r 6 is retrospective or otherwise, the filing of the notice of appeal in this case was done *after* its coming into force on 1 August 1993. As such, the rule was already in operation on the date of the filing of the notice of appeal and consequently, the filing of the record of appeal must comply with the requirement of r 6(3), ie within three weeks after the filing of the notice of appeal notwithstanding the fact that the decision appealed

against was made before the coming into force of the rule. The said three weeks had expired on or about 23 August 1993. Since the filing of the record in this case was done only on 28 April 1994, clearly it is outside the period prescribed by the Rules. This is clearly in violation of the requirement of the statutory provision. In the circumstances, the objection by the second defendant on this ground must succeed and as such the appeal of the plaintiff in this matter before me must be dismissed for failure to comply with O 49 r 6(3) of the Rules as regards the filing of the record of appeal.

Appeal dismissed with costs to the second defendant/respondent.

Appeal dismissed.

Reported by Anne Khoo